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No. 87-6700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN HENRY SELVAGE,

Petitioner,

v.

JAMES A. LYNAUGH,
Director, Texas Department of Corrections

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

At the time petitioner was tried, was there "cause" for not raising a claim based upon arguments later accepted in Penry v. Lynaugh, 106 L.Ed.2d 256 (1989); and if not, would the application of a procedural bar to this claim result in a "'fundamental miscarriage of justice,'" Smith v. Murray, 477 U.S. 527 (1986)?

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CITATION TO OPINION BELOW

The order of the District Court denying habeas corpus relief is unreported. JA 63-67. The opinion of the Court of Appeals is reported as Selvage v. Lynaugh, 842 F.2d 89 (5th Cir. 1988). JA 68-82.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered March 28, 1988. The petition for writ of certiorari was filed on March 29, 1988, and certiorari was granted on October 10, 1989. Jurisdiction is based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, which are set out in the Appendix hereto. It also involves Tex. Code. Crim. Proc. Ann. art. 37.01 (Vernon 1981), which is also set out in

the Appendix.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Mr. Selvage was convicted of capital murder on February 8, 1980, and was sentenced to death on February 11, 1980, in the District Court for the 230th Judicial District, Harris County, Texas. His conviction and sentence were affirmed by the Texas Court of Criminal Appeals on July 11, 1984. Selvage v. State, 680 S.W.2d 17 (Tex. Crim. App. 1984). No petition for certiorari was filed.

Mr. Selvage thereafter filed a petition for habeas corpus in the United States District Court for the Southern District of Texas. Relief was denied October 6, 1986, and the Fifth Circuit affirmed July 23, 1987. Selvage v. Lynaugh, 823 F.2d 845 (5th Cir. 1987). Certiorari was denied October 2, 1987.

Selvage v. Lynaugh, 98 L.Ed.2d 268 (1987).

On January 21, 1988, Mr. Selvage filed a state habeas corpus petition. On March 14, 1988, the District Court for the 230th Judicial District recommended denial of the petition. JA 29-37. On March 21, 1988, the Texas Court of Criminal Appeals adopted the recommendation. Ex parte Selvage, No. 16, 884-02; JA 38-39.

On March 22, 1988, Mr. Selvage activated a petition for habeas corpus which had previously been lodged in the United States District Court for the Southern District of Texas. JA 7-28. On March 25, 1988, the District Court entered orders dismissing three of Mr. Selvage's four claims, withholding adjudication of the fourth claim because it presented an issue then pending before the en banc Fifth Circuit in King v. Lynaugh, 828 F.2d 257 (5th Cir.), reh. en banc granted, 828

F.2d 269 (5th Cir. 1987), and granting a stay of Mr. Selvage's execution scheduled for March 30, 1988. JA 63-67. The state moved the Fifth Circuit to dissolve the stay of execution, and Mr. Selvage appealed from the dismissal of the three claims and sought a stay of execution on appeal if the District Court's stay was dissolved. On March 28, 1988, the Fifth Circuit granted the state's motion, denied Mr. Selvage's request for a stay, and denied a certificate of probable cause. Selvage v. Lynaugh, 842 F.2d 89 (5th Cir. 1988); JA 68-82.

On March 29, 1988, this Court granted a stay of execution, Selvage v. Lynaugh, No. A-741, and on October 10, 1989, it granted certiorari, limited to the question which -- as rephrased by the Court -- is set out at page i supra. JA 83.

B. Material Facts

i. Facts Which Were Presented at Trial

Sometime before the end of July, 1979, Wilbur Kelly told Carl Marlborough, that Kelly and John Selvage planned to commit several robberies. R. 2688, 2715-16.[1] On July 30, 1979, Kelly and Selvage, along with Brenda Joseph, entered Ventura's Jewelry in Houston to commit one of the robberies Kelly had mentioned.

Stephen Ventura, the owner of the store, felt uncomfortable when these three people entered because they had been in the store earlier and were not regular customers. R. 2296. Deputy Sheriff Al Garza of the Harris County Sheriff's Department was in the store that

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1 References to the record on appeal filed in the Texas Court of Criminal Appeals in connection with the direct appeal are to "R," followed by the page number of the sequentially paginated record as a whole.

afternoon. He was a friend of Ventura and had stopped to use the phone. R. 2294. Deputy Garza was in plain clothes but was wearing his badge on his belt and his service revolver. Id. Ventura told Garza about his discomfort. R. 2296. Garza came to one of the store's counters, removed his coat, "obviously" displayed his badge and gun, and began waiting on one of the three people. R. 2298, 2302. A few moments later, Ventura heard a gunshot, felt Garza slump against him, and immediately ran to a rear office to retrieve a gun. R. 2305-2306. He heard more gunshots and glass breaking; then he began shooting at the men in the store. R. 2306-2307. Ventura chased the men as they fled from the store; he shot at them; they both shot at him. R. 2308-2312. The men got to a car and drove off. Id. Deputy Garza had been killed in this

incident; no one else was injured.[2]

Neither Mr. Ventura nor anyone else in the store saw which person fired the shot that killed Deputy Garza.[3] R. 2363, 2395, 2445. However, Ken Roberts, an employee who was present, and Mr. Ventura both made significant observations about the demeanor of Wilbur Kelly and John Selvage during the course of the incident. Roberts testified that he knew that one of the men involved in the Ventura's robbery had been killed a few days after the robbery. R. 2433. He was not surprised to learn that the man killed was Wilbur Kelly, because Kelly "seemed

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2 Deputy Garza died from a single gunshot wound, which entered the right side of his neck and exited the left side, severing his subclavian artery. R. 2727-2728.

3 As revealed by an examination of the bullets recovered from the store, shots were fired by two guns other than Ventura's. R. 2758-2760. None of the bullets could be identified as the one that killed Deputy Garza. R. 2567-2568.

like the wilder of the two when they were in the store." Id. Ventura remembered that Kelly seemed to be the leader because he was calmer and talked more than Selvage, who was nervous. R. 2352-53. But Roberts was particularly troubled by Kelly's reckless demeanor: "[H]e acted stranger than the other man [Selvage]." Id.

During the penalty phase, the state offered additional evidence. Two prior federal convictions of Mr. Selvage were introduced, one for possession of controlled substances, the other for conspiracy to commit bank robbery. R. 2894. In neither case was there any indication that any person was harmed. The state also called a witness from the New Orleans Sheriff's Department, Captain Ronald Cherry. He told the jury that on July 22, 1975, while incarcerated in a

Louisiana state facility, Selvage escaped. R. 2897. On cross-examination, he revealed that, in attempting to escape, Selvage fell several floors and sustained significant injuries requiring hospitalization. No escape from the institution was effectuated. R. 2902.

Finally, the jury heard two witnesses implicate Mr. Selvage in a July 26, 1979 robbery/murder at a "Stop-and-Go" store in Houston.[4] Michael McWilliams told the jury that he was working at the Stop-and-Go convenience store when a person he identified as Selvage entered with another black male and demanded money from the register. R. 2834-45.[5] McWilliams was

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[4] Mr. Selvage was never formally charged with or tried for this crime.

[5] There was no dispute that the other person involved in this incident was Wilbur Kelly. See R. 2973 (prosecutor arguing that Selvage and Kelly had committed the Stop-and-Go robbery four days before the Ventura's robbery). Consistent with the observations of the respective roles and demeanors

ordered to the back room and later placed in a small bathroom. Id. After hearing the assailants searching for money, McWilliams heard gunshots. He waited a while in the bathroom and then went to the front of the store, where he saw a customer who had been shot. Id. Neither McWilliams nor Al Bell, another customer in the store at this time, saw which of the robbers shot the customer (who later died). R. 2881.

The defense offered Mr. Selvage's sister, Audrey Picou, as its primary witness in mitigation. Picou initially described her brother's upbringing. She told the jury that Selvage had been raised in a very close, religious family

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of Kelly and Selvage in the Ventura's robbery, McWilliams testified that Kelly was the first person to pull out a gun and to order him around. R. 2838. While Kelly was emptying the cash register Selvage was just watching; he did not have a gun out at that time. Id.

and, unlike other children they knew, had been exposed to the arts and music. R. 2895-2912. In school he was an "A" and "B" student. Id. Throughout his early and school years, he was a happy, normal child.

In 1968, Ms. Picou recalled, Mr. Selvage was drafted into the military. When he was discharged not quite two years later, he came back a very different person. R. 2911. In her terms "he came back in a straight jacket." R. 2910. He had become addicted to heroin and spent several months in military hospital treatment centers. Id. When he finally returned to New Orleans, he was not able to work for a period of time, but later found work at a gas station. R. 2910-11.

She testified further that she had never seen Mr. Selvage exhibit violent behavior and she opined that he was a

peaceful person. R. 2912, 2921. This was consistent with their family, she said: no other family member had ever been arrested. R. 2912-13. She also opined that Mr. Selvage had the strength of character to be rehabilitated. R. 2914.[6]

ii. Penalty Phase Argument and Instruction

The defense case in relation to special issue one[7] rested on the absence of evidence that Mr. Selvage shot Deputy Garza or anyone else. R. 2947-48, 2951-52. Defense counsel relied upon the absence of evidence to argue that Selvage did not shoot anyone and thus did not

[6] The only other defense witness was Dr. Jose Garcia, director of mental health services for the Texas Department of Corrections, R. 2924, who described the rehabilitative programs offered by the Department of Corrections to inmates.

[7] "Do you find from the evidence beyond a reasonable doubt whether the conduct of the defendant, John Henry Selvage, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" JA 4.

deserve to die. R. 2952. Counsel conceded that even though Selvage did not shoot anyone, the jury could answer special issue one "yes." R. 2951 ("there is no question that under the law you have got the option to execute John Selvage"). However, he urged the jury not to do so as a matter of "conscience." Id.

In response, the prosecution argued that it did not matter whether Selvage actually shot Al Garza. The requirement of special issue one that "the conduct of the defendant ... that caused the death of the deceased [be] ... committed deliberately," JA 4, was satisfied because there was evidence that Mr. Garza was killed deliberately -- even though one could not say whether the killer was Wilbur Kelly or John Selvage -- and because Selvage had engaged in other deliberate criminal acts during the course

of the crime: planning the robbery, arming himself, and shooting at people other than Garza. R. 2968-71. The prosecutor conceded, "[w]e can't say the bullet came out of ... the defendant's gun...." R. 2970. However, he twice reiterated that the "deliberately committed conduct" aspect of special issue one did not require that Selvage be the one who fired the fatal shot so long as Selvage engaged in other deliberate acts in furtherance of the crime. R. 2972, 2973.

The prosecutor then argued that the second aspect of issue one, which focused on the defendant's "reasonable expectation that the death of the deceased or another would result," JA 4, was readily established by two facts: the act of taking a loaded gun into a store to commit a robbery, and Mr. Selvage's experience four days before the Ventura's robbery

when, during the armed robbery of the Stop-and-Go market, someone was killed. R. 2973.

On the basis of this analysis, the prosecution argued that the jury had no choice but to answer special issue one "yes." "The only proper answer to the first question is yes. That is the only proper answer based on the evidence." Id.

The prosecution's case in relation to special issue two[8] rested on Mr. Selvage's convictions of federal crimes, his attempted escape in New Orleans, and his participation in the Ventura's and Stop-and-Go robbery-murders. R. 2974-75.

The defense sought to put Mr. Selvage's criminal acts in perspective by emphasizing that they did not begin until

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8 "Do you find from the evidence beyond a reasonable doubt whether there is a probability that the defendant, John Henry Selvage, would commit criminal acts of violence that would constitute a continuing threat to society?" JA 4.

he returned from the military "in a strait jacket" due to drug addiction, after which he "started engaging in a life of crime." R. 2945. His addiction was portrayed as the primary factor underlying his criminal activity:

> This drug situation, I am not going to come into you and say it wasn't John Selvage that was convicted before -- it was the drugs -- that's what did it. He had no free will of his own.

R. 2957.

iii. Facts Revealed in the Habeas Corpus Proceedings Which Were Not Presented To The Jury

In the subsequent state and federal habeas corpus proceedings, facts were discovered which were highly material to the appropriateness of a death sentence for Mr. Selvage. These facts demonstrated that Mr. Selvage was far more disabled--mentally, emotionally, and physically--than the trial evidence revealed, and that

it was more likely that Wilbur Kelly, not Selvage, fired the shot that killed Deputy Garza. Most of these facts were developed through new investigation, but some had emerged at a pretrial hearing on Mr. Selvage's motion to suppress his confessions. They are presented here because they bear upon the Court's "fundamental miscarriage of justice" inquiry.

There was substantial evidence to support Audrey Picou's penalty trial testimony that her brother came back from the military addicted to drugs. On the day before he was arrested,[9] Mr. Selvage injected both an amphetamine (Preludin) and heroin. R. 683, 686-87, 776-77. The New Orleans police officers who arrested

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[9] Mr. Selvage was arrested on August 10, 1979 in New Orleans, ten days after the Ventura's Jewelry store robbery. He was from New Orleans and returned there after the robbery.

him suspected that he was under the influence of drugs, because he was "a little incoherent on occasion[,] ... nodding in and out", R. 532 (Det. Albright), "lackadaisical[,] ... kind of slowed down [,] ... [and] [d]rifting in and out of reality," R. 571 (Det. Miller). Further, there was substantial evidence of chronic drug use and addiction. In the suppression hearing, Mr. Selvage testified that he was using $200 to $300 worth of drugs every day. R. 780. Objective evidence of his addiction was apparent to the police. He displayed some of the symptoms associated with heroin withdrawal -- stomach cramps, extreme thirst, and a craving for something sweet, R. 532, 539, 633, 652-53 -- and he had needle marks on his arms. R. 652.

However, an addiction to mind-and-mood-altering drugs was not the only

disability suffered by Mr. Selvage. He also suffered from severe mental illness and from the effects of brain damage. Together with his drug addiction, these disabilities led him to become associated with a highly aggressive, reckless, violent man like Wilbur Kelly, and made him vulnerable to participating with Kelly in the crimes for which he was sentenced to death.

By the time of the robberies in Houston, Mr. Selvage had suffered the symptoms of psychosis for nearly a decade. These symptoms were first documented in April, 1970, when Mr. Selvage was only nineteen years old. He was medically discharged from the Air Force at that time because he was becoming psychotic. The examination which precipitated his discharge revealed that Mr. Selvage was seen on an emergency basis because "[he]

rammed his fist through a window in an attempt to catch the people that he thought were 'spying' on him." Appendix A to the federal habeas petition.[10] The examination further revealed that Mr. Selvage "felt people were watching him everywhere on base," "admitted hearing whispering voices at night over the past few weeks and ... that these voices were talking about him," experienced "frequent ideas of reference,"[11] had a "blunted affect," and as a result of these things, "had difficulty sleeping at night and

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10 The petition, without the appendices, is at JA 7-28.

11 An "idea of reference" is "[a]n idea, less firmly held than a delusion, that events, objects, or other people in the person's immediate environment have a particular and unusual meaning specifically for him or her." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 399 (3d Ed. Revised 1987) [hereafter, "DSM-III-R"].

performing his duties at work." Id. [12]

Thereafter, when Mr. Selvage was incarcerated for a federal conviction in the latter half of the 1970's, Bureau of Prisons mental health personnel diagnosed him as suffering from "paranoid schizophrenia." Appendix B to the habeas petition.[13]

In December, 1987 and again in January, 1988, Mr. Selvage was examined by a psychiatrist, Dr. James R. Merikangas. On the basis of Selvage's "well-documented history of psychosis from at least 1969 or 1970", a history of "severe head

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12 Mr. Selvage's symptoms are characteristic of the delusions, hallucinations, peculiar ideas, affect, and impairment in every day functioning associated with paranoid schizophrenia. See DSM-III-R, at 194-95, 197.

13 From the date of this diagnosis in January, 1977, until his release from federal custody in late 1978, Mr. Selvage was given daily therapeutic doses of Thorazine, a drug often used in the treatment of schizophrenia.

injury,"[14] the continuing treatment of Selvage with anti-psychotic medications and anti-seizure medication on death row, and his own examination of Selvage, Dr. Merikangas concluded that Selvage still suffered from a psychotic illness, and, in addition, from brain dysfunction. Appendix D to the habeas petition, at 3.

Dr. Merikangas' diagnosis was confirmed in evaluations of Mr. Selvage that were conducted at the request of the state during the pendency of Selvage's state habeas petition in February, 1988. Dr. John Nottingham, the state's psychiatrist, noted that on February 9, 1988, Selvage "does still appear to have evidence of delusional thinking in regards to his concept of various personalities

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[14] Mr. Selvage's severe head injury was documented "in the [medical] records as a skull fracture, as the result of a fall from a multiple story building." Appendix D to the habeas petition, at 2.

taking over his mind and body and he indicates that at times he has auditory hallucinations." Appendix C, attached to Petitioner's Supplemental Memorandum in Support of Motion to Stay Execution, March 23, 1988, filed in the United States District Court for the Southern District of Texas (No. H-86-0166), at page 4. Upon reviewing Selvage's history, Dr. Nottingham concluded, "It would appear that the subject does have a long standing history of mental illness which has reflected itself in overt psychosis at various times." Id. Similarly, the state's psychologist, Dr. Jerome Brown noted the following:

> Mental status examination reveals the defendant to still exhibit a number of symptoms of severe mental illness including the delusional belief that his body is inhabited by several personalities, the continuing experience of auditory hallucinations, and his tendency to answer questions in

> a very talkative, somewhat rambling fashion. In addition, the defendant does have a significant past psychiatric history and describes his current difficulties in a manner that makes them credible.

Appendix D, op. cit., supra, at page 3.[15]

In light of Mr. Selvage's history and the unavailability of treatment at the time of the Ventura's Jewelry robbery, Dr. Merikangas concluded that Selvage was suffering "from a psychosis as well as other disorders at the time of the crime." Appendix D to the habeas petition, at 3-4. Further, he concluded that the psychosis, together with the impairments of drug intoxication and brain damage, would have substantially impaired Selvage's capacity to appreciate the wrongfulness of his

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15 Mr. Selvage's medical records since his incarceration on death row are consistent with the views of the forensic experts. Prison personnel have frequently recorded his experiencing "bizarre and apparently psychotic delusions," JA 21, "somatic delusions," id., and paranoid delusions accompanied by hallucinations, JA 21-22.

criminal conduct and to refrain from engaging in such conduct at that time. Id., at 4. As he explained,

> According to John, he was high on heroin and amphetamines at the time of the crime. Amphetamines alone can induce a paranoid state and generate increased motor activity, resulting in paranoid ideation and violent acts which may be completely spontaneous or in response to command hallucinations. The kind of brain injury that John has probably suffered would have compounded both the drug-induced paranoia and his pre-existing psychosis, for such an injury lowers one's ability to modulate and resist strong impulses. The severity of John's psychosis would likely have caused him to misperceive simple gestures as threats and to act on them without any basis in reality.

Appendix D to the habeas petition, at 4.

This analysis was relevant on the assumption that Mr. Selvage was the person who fired the fatal shot at Deputy Garza: if Selvage did fire that shot, he likely did so because he misperceived Deputy

Garza as threatening him. But Dr. Merikangas also determined that Selvage's disabilities could have played a very different role during the Ventura's robbery. They could, if various conditions were present, have caused him to go along passively with a scenario in which Wilbur Kelly, rather than Selvage, was the primary aggressor. As Dr. Merikangas explained:

> While these combined factors could have produced a violent, uncontrolled outpouring of aggressive behavior, John's use of heroin could have mollified his aggression -- if the dosage were high enough -- and taken away his will to act. In this state, without the ability to perceive the external world accurately and make appropriate judgments in response to it because of his psychosis, John could have been peculiarly susceptible to the coercion, influence, and designs of others.

Appendix D to the habeas petition, at 4.

Dr. Merikangas' alternative

formulation of the potential effects of Mr. Selvage's disabilities at the time of the crime takes on added significance in light of other evidence not considered by Selvage's trial jury: evidence that Wilbur Kelly, rather than Selvage, actually killed Deputy Garza. Dr. Merikangas' observation that Mr. Selvage's disabilities could have made him a passive follower at the time of the Ventura's robbery -- relatively unaggressive and vulnerable to Kelly's domination or influence -- is quite consistent with witnesses' observations of Kelly and Selvage during both the Ventura's and the Stop-and-Go robberies. So is evidence relating to the arrest of Selvage and attempted arrest of Kelly in New Orleans ten days after the robbery of Ventura's Jewelry.

On August 10, 1979, police offers

tried to arrest Wilbur Kelly in New Orleans, where he was wanted for the commission of two other murders. John Selvage, who had returned to New Orleans shortly after the Ventura's robbery, was arrested first, at 4:30 a.m. that day, for his participation in the Ventura's and Stop-and-Go robberies in Houston. R. 500, 503, 536. The New Orleans officers who arrested Selvage were primarily interested in apprehending Kelly, due to the Louisiana murders, R. 536, and their strong belief that Kelly was "a killer." R. 547. Thus, their questioning of Selvage was directed to learning where Kelly might be found. R. 547. Selvage gave the officers this information. R. 523. Thereafter, at approximately 7:30 a.m., New Orleans officers located Kelly and, in attempting to arrest him, engaged him in a shootout which ended when he was

killed. R. 536, 546-47.

Late in the afternoon on the same day, two Houston police officers, E.T. Yanchak and C.W. Kent, arrived in New Orleans to interrogate Selvage about the two robbery-murders in Houston. Based on their previous investigation, they believed that Wilbur Kelly had fired the fatal shot in the Ventura's Jewelry robbery. As Detective Yanchak testified,

> Q. [At] th[at] time ... you knew from the statements taken from Eugene Wadis, Peanuts and Brenda Joseph that they said Wilbur Kelly did the shooting of Al Garza?
>
> A. Yes sir.
>
> Q. In your mind you knew Wilbur Kelly did the shooting of Albert Garza according to the statements you had?
>
> A. Yes sir.

R. 653. Detective Kent agreed that "there was no doubt about who did the killing," for he had "sufficient statements that

Wilbur Kelly had killed Albert Garza." R. 629.

For this reason, at the commencement of the interrogation of Mr. Selvage, Detective Kent told Selvage that Wilbur Kelly had been killed in a shootout with the New Orleans police that day. R. 614. He then told Selvage that if Kelly had fired the fatal shot at Officer Garza, he should get "the heat off his back" and tell the police what happened. R. 614-15; 653. Mr. Selvage responded by giving two confessions. In the first, he confessed to participating in the robbery of the Stop-and-Go market with Wilbur Kelly. In the second, he described his participation in the robbery of Ventura's Jewelry. He admitted firing his gun during the Ventura's robbery, but he said that Wilbur Kelly was the person who killed the people

in each robbery.[16]

SUMMARY OF ARGUMENT

Mr. Selvage's death sentence did not reflect a "reasoned moral response" to the evidence because the sentencing process failed to provide his jury with a vehicle to give mitigating effect to the evidence that he was addicted to mood-and-mind altering drugs at the time of the crime, and that he did not kill Deputy Garza.

The state courts' refusal to review this Penry claim on the merits does not amount to an "adequate and independent state law ground" precluding merits review in this Court. Penry invokes a long-recognized exception to the Texas contemporaneous objection rule that now allows the claim to be entertained on its

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16 Even though the trial judge overruled Mr. Selvage's motion to suppress the confessions, R. 884, the prosecution did not thereafter introduce them at trial.

merits. In addition, because the Texas default rule has seldom been applied to bar untimely Penry-type claims, the state law ground is not "adequate." Further, since the state courts' default rule requires consideration of whether Penry announced a rule that was not recognized previously by the state court, the state law ground is not "independent."

In any event, Mr. Selvage shows cause for his failure to raise his Penry claim at his 1980 trial. By that time, the Texas Court of Criminal Appeals, relying upon decisions from this Court, had held repeatedly and unequivocally that no instructions beyond the special issues were needed to permit mitigation to be fully considered under the Texas capital scheme. No court decision from other states, or the federal courts, was available to help counsel construct an

argument to question in 1980 this hard-and-fast rule.

A miscarriage of justice will occur if the Court fails to review the Penry violation, which precluded the jury from taking into account the reasons Selvage should not have been sentenced to death, the most important constitutional requisite for a capital sentencing decision. But for this error, the jury would not have voted for death, for all the relevant evidence, including evidence not known to the jury, showed that Selvage's participation in the crime was induced and shaped by severe mental illness and that he killed no one.

ARGUMENT

I. NO ADEQUATE AND INDEPENDENT STATE GROUND BARS MR. SELVAGE'S PENRY CLAIM

Mr. Selvage presented his Penry[17]

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[17] Penry v. Lynaugh, 106 L.Ed.2d 256 (1989).

claim for the first time in postconviction proceedings. Following the recommendation of the state habeas judge, the Texas Court of Criminal Appeals held that Selvage's failure to raise the claim at trial constituted a procedural default. See, JA. 34-35; 38-39. For this reason the court below, finding no "cause" for the default, refused to entertain the Penry claim on the merits.[18] JA. 77-78

Before reaching the "cause" inquiry under Wainwright v. Sykes, 433 U.S. 72 (1977), this Court must first conclude that the inquiry is necessary. A precondition to "cause and prejudice" analysis under Sykes is the existence of a state procedural bar that constitutes an

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[18] The Fifth Circuit concluded: "a Federal habeas court cannot review a claimed error in the conduct of a state criminal trial when the state has refused review in reliance on its contemporaneous objection rule, absent cause and prejudice for failure to object. We find no legal cause for the absence of an objection." Id.

adequate and independent state-law ground for refusing to entertain a federal habeas petitioner's constitutional claims. Harris v. Reed, 103 L.Ed.2d 308 (1989). Thus, the threshold question for the Court to "consider [is] whether [Texas] ... law provides an adequate and independent state ground for the refusal to vacate petitioner's sentence." Johnson v. Mississippi, 100 L.Ed.2d 575, 585 (1988).[19]

There are two reasons why this Court should not uncritically accept the state court's now-outdated conclusion that Selvage's Penry claim is procedurally barred. First, because that conclusion preceded Penry, it is no longer viable as

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[19] The Court has held consistently that "the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." Henry v. Mississippi, 379 U.S. 443, 447 (1965).

a matter of state law after Penry. Long-established Texas default jurisprudence provides for -- rather than forbids -- the belated entertainment of constitutional claims after they have been recognized in an authoritative decision of this Court postdating the claimant's trial. As we show below, no rule of Texas law presently bars Mr. Selvage from asserting his Penry claim at this stage of the case. Second, if a state-law ground were to be invoked as a bar to Selvage's Penry claim, its application to these circumstances would violate the principles that a state procedural rule must be applied "evenhandedly to all similar claims," Hathorn v. Lovorn, 457 U.S. 255, 263 (1982), and must not be substantively entangled with a ruling of federal constitutional law, in order to qualify as an "adequate" and "independent" state

ground.

A. Texas Law Excuses the Failure of a Criminal Defendant to Raise at Trial a Constitutional Claim Which Had Not Been Recognized at the Time of Trial But Is Subsequently Vindicated by This Court

For many years, the Texas Court of Criminal Appeals has recognized an important exception to its procedural default rule. As explained in Ex parte Chambers, 688 S.W.2d 483, 486 (Tex. Cr. App. 1984) (Campbell, J., concurring), "a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized" (emphasis added).[20] This exception has been held to apply with

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[20] See also Cuevas v. State, 641 S.W.2d 558 (Tex. Cr. App. 1982); Boulware v. State, 542 S.W.2d 677 (Tex Cr. App. 1976); Ex parte Casarez, 508 S.W.2d 620 (Tex Cr. App. 1974); Ex parte Sanders, 580 S.W.2d 383 (Tex. Cr. App. 1979); Ex parte Taylor, 484 S.W.2d 748 (Tex. Cr. App. 1972).

particular force where "the new principles relied upon [by the defendant] overruled considerable Court of Criminal Appeals case law, or was, in fact, quite novel and an objection based upon it would have been futile." Chitwood v. State, 703 S.W.2d 360, 362 (Tex. Cr. App. 5th Dist. 1986) (emphasis added).

The Texas courts have repeatedly applied this exception and entertained otherwise defaulted constitutional claims after a decision of this Court has "overruled considerable Court of Criminal Appeals case law." Prior to this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981), for example, the Texas courts had frequently held that state psychiatric interviews with capital defendants resulting in testimony on future dangerousness implicated neither Fifth nor

Sixth Amendment interests.[21] After Smith was handed down, the Court of Criminal Appeals accordingly concluded that Smith announced a right it had not previously recognized,[22] and it began to entertain these claims on their merits without

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21 See Smith v. State, 540 S.W.2d 693 (Tex. Cr. App.. 1976); Moore v. State, 542 S.W.2d 664 (Tex Cr. App. 1976); Livingston v. State, 542 S.W.2d 655 (Tex. Cr. App. 1976).

22 In Field v. State, 627 S.W.2d 714 (Tex. Cr. App. 1982) Justice McCormick described the effect of Smith upon Texas law:

> Both holdings in Estelle v. Smith changed the law in Texas. This Court had for years rejected claims on these bases. Never before had it been held that a court-appointed mental health expert must warn a defendant of his right to remain silent and that evidence adduced in the psychiatric interview could be used against him. Never before had it been held that the defendant (sic) attorney could receive notice before a psychiatric interview on the dangerousness issue could be held. In fact, in numerous cases this Court rejected the contentions that the proceedings used in Estelle v. Smith violated a defendant's rights.

627 S.W.2d at 723-24 (McCormick, J., concurring).

regard to whether defense counsel had noted a timely objection at trial. In case after case, it ignored capital defendants' failure to assert timely Smith claims and considered the merits of these claims. See, e.g., Ex parte Demouchette, 633 S.W.2d 879 (Tex. Cr. App. 1982)(claim not raised at trial or on direct appeal; relief granted in habeas proceedings); Ex parte Chambers, supra (no objection at trial; default found on direct appeal before Smith was decided, Chambers v. State, 568 S.W.2d 313, 325 (Tex. Cr. App. 1978) ("[n]o objection was made to any of the testimony now challenged[,] [n]othing is presented for review"); full relief granted in habeas proceedings); Ex parte Woods, 745 S.W.2d 21 (Tex. Cr. App. 1988)(trial counsel voiced general objection at 1976 trial; claim not raised on direct appeal; court reviewed merits of

claim in habeas proceedings); Powell v. State, 742 S.W.2d 353, 366 (Tex. Cr. App. 1987)(majority reached defaulted claim on merits and denied relief; dissenting Justice explained why the defaulted claim must be entertained on its merits: "[w]here a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver[,]" [cites omitted][;] "[t]his is now part of our state procedural default rule dealing with preservation of constitutional error").

The United States Court of Appeals for the Fifth Circuit has similarly applied this settled feature of Texas law. In Muñiz v. Procunier, 760 F.2d 588 (5th Cir. 1985), as here, the Texas Court of Criminal Appeals had held a death-sentenced inmate's pre-Smith claim

procedurally barred before the landmark decision of this Court establishing its merit. After that decision, the Fifth Circuit found that the bar no longer existed.

> Under the well-established Texas law in 1978 and 1979 the interview of the psychiatrist was held not to be testimonial or adversarial, thereby not implicating the Fifth or Sixth Amendments. [Citations omitted.] After Estelle v. Smith corrected these Texas holdings, the Texas Court of Criminal Appeals ruled that the failure to object at a trial conducted prior to the Supreme Court's decision constitutes no waiver of Estelle v. Smith violations....
>
> Where the state court has rejected petitioner's claim on grounds of procedural waiver under an incorrect view of the underlying law and where the state now applies no waiver under the circumstances, no consideration of comity would lead a federal court to bar the petitioner from presenting these claims.

Muniz v. Procunier, 760 F.2d at 589-90.

The same exception to procedural

default was held applicable in the wake of other decisions by this Court recognizing the validity of claims that Texas had earlier rejected. After Witherspoon v. Illinois, 391 U.S. 510 (1968),[23] and Adams v. Texas, 448 U.S. 38 (1980),[24] the Court of Criminal Appeals entertained previously defaulted claims and granted relief on them. It did so, too, after Burgett v. Texas, 389 U.S. 105 (1967),[25] and

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23 See, e.g., Ocker v. State, 477 S.W.2d (Tex. Cr. App. 1972) (granting relief on unpreserved Witherspoon claim); Ex parte Martin, 479 S.W.2d 280 (Tex. Cr. App. 1972) (same); Boulware v. State, 542 S.W.2d 677, 681-82 (Tex. Cr. App. 1976) (explaining Ocker and Martin).

24 See, e.g., Cuevas v. State, 641 S.W.2d 558 (Tex. Cr. App. 1982) (granting relief on unpreserved Adams claim); Hartfield v. State, 645 S.W.2d 463 (Tex. Cr. App. 1980) (same).

25 See, e.g., Ex parte Cesarez, 508 S.W.2d 620, 622 (Tex. Cr. App. 1974) (granting relief on unpreserved Burgett claim); Ex parte Flores, 537 S.W.2d 458, 459 (Tex. Cr. App. 1976) (reviewing merits of unpreserved Burgett claim); Ex parte Hall, 546 S.W.2d 303, 304 (Tex Cr. App.1977) (same); Ex parte Ropollo, 550 S.W.2d 869, 871 (Tex. Cr. App. 1977) (same).

Washington v. Texas, 388 U.S. 143 (1967).[26]

Since Penry v. Lynaugh plainly upset an unbroken line of Texas caselaw refusing to require any sort of supplemental instructions on mitigation despite Jurek v. Texas, 428 U.S. 262 (1976), and Lockett v. Ohio, 438 U.S. 586 (1978), [27] it is not surprising that the Court of Criminal Appeals is now treating post-Penry claims exactly as it treated post-Smith claims, post-Witherspoon claims, and so forth. In its first opinion after Penry, it reached the merits of a Penry claim although noting "that appellant did not request additional instructions regarding mitigating evidence during the punishment phase of the trial." Callins v. State,

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26 See, e.g., Ex parte Turner, 542 S.W.2d 187, 189 (Tex Cr. App. 1976) (reviewing merits of unpreserved Washington claim).

27 See Point II, infra.

No. 69,023 ___ S.W.2d ___ (Tex. Cr. App. September 27, 1989)(slip op. at 15). It explained that "[i]n Penry v. Lynaugh, ... the United States Supreme Court held the Texas capital murder statute unconstitutional 'as applied' in the face of a challenge based on the lack of instructions concerning mitigating circumstances," id. at 16, and it therefore undertook to consider whether Callins' mitigating evidence, like Penry's, constitutionally required "an additional instruction to the jury." Id. at 17.

Since Texas law no longer holds Mr. Selvage's Penry claim procedurally barred,[28] a federal court must hear it.

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28 Respondent argues that two recent Court of Criminal Appeals decisions have abandoned the rule of Ex parte Chambers and adopted one like that of Engle v. Isaac, 456 U.S. 107 (1982). See Respondent's Opposition To Motions To Certify Question To Texas Court of Criminal Appeals And To Suspend Briefing And Further Consideration of Case

As the Fifth Circuit wrote in Muniz v. Procunier, supra, "no consideration of comity would lead a federal court to bar the ... claim[]" under these circumstances. 760 F.2d at 590.

B. Any State-Law Bar Would Not Be "Adequate," as It Is Enforced Neither Consistently nor Strictly; Nor Would It Be "Independent," as It Depends upon a Federal Constitutional Ruling

This Court has consistently recognized that only state rules which are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights." James v. Kentucky, 466 U.S. 341, 349-350 (1984). "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar cases." Barr v. City of Columbia, 378 U.S. 146, 149 (1964). Because the Texas courts have no "firmly established" or "regularly followed" rule barring the entertainment of claims like Mr. Selvage's unless raised by an objection at trial, any state-law bar interposed against his Penry claim cannot be "adequate" so as to preclude a review of the claim on the merits.

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at 3-8, citing Williams v. State, 773 S.W.2d 525 (Tex. Cr. App. 1988), and Mathews v. State, 768 S.W.2d 731 (Tex. Cr. App. 1989). This is simply wrong. In both Williams and Mathews, the Court of Criminal Appeals held that because Batson v. Kentucky, 476 U.S. 179 (1986), did not recognize a new right but merely adjusted the evidentiary burden a criminal defendant must meet to prove an equal protection claim based on racial discrimination in jury selection, the exception to the default rule recognized in Ex parte Chambers did not apply to such claims. While the original opinion in Williams could be read as suggesting that the Court was forsaking its own Chambers rule and adopting a standard more like Engle's, the majority in Mathews rejected this approach and asserted once again that Chambers correctly states Texas' default law. On rehearing, a majority of the Williams court accepted Mathews. And since Williams the Court of Criminal Appeals has again reaffirmed the Chambers rule, James v. State, 772 S.W.2d 84 (Tex. Cr. App. 1989), noting that "Chambers sets out the test which determines when a judicial decision, decided subsequent to a defendant's trial, relieves that defendant from making a contemporaneous objection." Id. at 101.

We have shown in the preceding subsection that Texas law provides a well-established exemption from procedural default in circumstances like Selvage's, where a supervening decision of this Court upsets a chain of Texas precedents rejecting a federal constitutional claim. And indeed, even without the supervening decision, Texas' procedural-default rule is more often honored in the breach than in the observance.

In Williams v. State, 674 S.W.2d 315 (Tex. Cr. App. 1984), for example, Williams claimed that the absence of instructions beyond the special issues "so limited the deliberateness issue as to no longer include proper consideration of mitigating circumstances or meet Constitutional requirements to protect against 'a wanton and freakish assessment of the death penalty.'" Id. at 321.

Noting that "appellant did not request any charges, nor did he object to those given," the court nevertheless examined the claim and denied relief on the merits. Id.

In Stewart v. State, 686 S.W.2d 118 (Tex. Cr. App. 1984), Stewart contended that because the Texas statute "contains no provisions for directing and instructing the jury's consideration of mitigating circumstances," id. at 121, it violates the Eighth and Fourteenth Amendments. After noting that "appellant never requested the trial court to charge on mitigation," the Court of Criminal Appeals concluded that "no jury charge regarding evidence of any mitigating circumstances was necessary since the questions prescribed under Article 37.071 clearly allow the jury to grasp the logical relevance of mitigating evidence."

Id.

In several other cases before and after Williams and Stewart, the Court of Criminal Appeals has similarly overlooked procedural default and reached the merits of claims akin to Mr. Selvage's.[29] Indeed, before Selvage's case, the Court of Criminal Appeals had rarely indicated

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29 See, e.g., Johnson v. State, 691 S.W.2d 619, 626 (Tex. Cr. App. 1984) (appellant claimed trial court's charge violated Eighth Amendment because it did "not clearly guide the jury in understanding mitigating circumstances and their purpose and of their option to recommend life imprisonment even though aggravating circumstances are found"; claim raised for the first time on appeal; court holds trial court's charge "correctly instructed the jury on the law"); Clark v. State, 717 S.W.2d 910, 920 (Tex. Cr. App. 1986) (appellant argued lack of instructions on mitigation created risk that jury did not "consider and weigh" mitigating circumstances in answering penalty questions; overlooking lack of request for "any" instructions, court holds instructions adequate); Sosa v. State, 769 S.W.2d 909, 916 (Tex. Cr. App. 1989) ("appellant argues fundamental error occurred when the trial court failed to instruct the jury . . . that they could consider mitigating circumstances in their deliberations on the special issues"; no objection; court reaches merits and denies relief); Motley v. State, 773 S.W.2d 283 (Tex. Cr. App. 1989) (same); see also Adams v. State, 577 S.W.2d 717, 729-730 (Tex. Cr. App. 1979).

that a failure to object at trial would bar constitutional claims based upon the insufficiency of instructions on mitigation.[30] This pattern of decisions stands in sharp contrast to the Florida practice reviewed in Dugger v. Adams, 103 L.Ed.2d 435 (1989), where the Court found that "[i]n the vast majority of cases, the Florida Supreme Court had faithfully applied its rule" of procedural default. Id. at 445 n.6. Here, the "vast majority of cases" shows that the Texas court has habitually overlooked the lack of a timely

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30 In Fierro v. State, 706 S.W.2d 310, 318 (Tex. Cr. App. 1986), Fierro contended on direct appeal that his death sentence should be vacated, inter alia, because the trial court failed to charge the jury on mitigating evidence. Noting there was no "special requested charge on mitigating evidence," the court held "[n]othing is presented for review." Id. The court thereafter looked at the merits of the issue and concluded "[t]here is nothing to show that the jury was prevented from considering" the mitigating evidence. Id. See also Williams v. State, 622 S.W.2d 116 (Tex. Cr. App. 1981) (same).

objection and reached the merits of Penry-like claims. Because a state court cannot "avoid deciding federal issues by invoking procedural rules that [it does] ... not apply evenhandedly to all similar cases," Barr v. City of Columbia, supra, 378 U.S. at 149, any state procedural bar in Mr. Selvage's case would not be an "adequate" ground of decision.

Nor would it be an "independent" state ground. This Court has long held that "when the resolution of the state procedural rule depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law...." Ake v. Oklahoma, 470 U.S. 68, 75 (1985). See also Herb v. Pitcairn, 324 U.S. 117 (1945). As we have shown above, the Court of Criminal Appeals does not enforce its contemporaneous objection rule when, inter

alia, decisions of this Court announce a right that the Texas courts had not previously recognized. In this respect, the Texas default rule works in the same way as the one this Court considered in Ake. There, Oklahoma law had been construed to allow review of defaulted claims falling in the category of "fundamental trial error." Federal constitutional error was expressly recognized as constituting fundamental error. 470 U.S. at 74-75. This Court rejected Oklahoma's argument that the refusal of the state's highest court to review the defaulted federal issue constituted an adequate and independent state law ground because "the State has made application of the procedural bar depend on an antecedent ruling on federal law.... " Id. Here, too, the interrelationship of state law and federal

constitutional rulings precludes a finding that any state procedural bar applied to Mr. Selvage would be "independent" and sufficient to preclude decision on the merits.

II. MR. SELVAGE'S FAILURE TO RAISE A PENRY CLAIM AT TRIAL SHOULD BE EXCUSED FOR "CAUSE" SINCE THAT CLAIM WAS NOT REASONABLY AVAILABLE TO COUNSEL

In Wainwright v. Sykes, 433 U.S. 72 (1977), the Court adopted the "cause and prejudice" requirement of Francis v. Henderson, 425 U.S. 536 (1976), for all petitioners seeking federal habeas relief on constitutional claims defaulted in the state courts. The Sykes Court did not elaborate upon this requirement, but rather left open "for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard." 433 U.S. at 87. Subsequently, in Reed v. Ross, 468 U.S. 1 (1984), the Court

explained that although a "tactical" or "intentional" decision to forego a procedural opportunity normally cannot constitute cause, id. at 13-14, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." Id. at 14.

Mr. Selvage submits that there was "cause" under Reed for his trial counsel's failure to make the contentions later vindicated in Penry v. Lynaugh, supra, because the Penry issue was so totally foreclosed at the time of his trial that his attorney could not reasonably have been expected to raise it. Penry squarely falls into that category of decisions identified in Reed as creating a claim that was not reasonably available to trial counsel beforehand inasmuch as it "'disapprov[ed] a practice this Court

arguably ha[d] sanctioned in prior cases.'" 468 U.S. at 17 (quoting United States v. Johnson, 457 U.S. 537, 551 (1982)). In this situation, Reed teaches that whether the failure of a defendant's attorney to have raised an issue is sufficiently excused by "cause" depends upon "how direct this Court's sanction of the prevailing practice had been, how well entrenched the practice was in the relevant jurisdiction at the time of the defense counsel's failure to challenge it, and how strong the available support [was] from sources opposing the prevailing practice." Id. at 17-18.

At the time of Mr. Selvage's trial, two decisions of this Court appeared to foreclose any colorable contention that Texas' statutory procedure of submitting three "special issues" to the jury as the sole questions for its determination at

sentencing interfered with the Eighth and Fourteenth Amendments' requirement of consideration of mitigating circumstances.

In Jurek v. Texas, 428 U.S. 262 (1976), the Court specifically took note of the Texas statute's potential for precluding the jury's consideration of mitigating circumstances, but reasoned that "the constitutionality of the Texas procedures turn[ed] on whether the enumerated questions allow[ed] consideration of particularized mitigating factors." Id. at 272. The Court upheld the statute under special issue number two, which "asks the jury to determine 'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' if he were not sentenced to death," id., because

> [t]he Texas Court of Criminal Appeals has ... indicated that

> it will interpret [the future dangerousness] question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show[.]

Id. The Court's rationale did not call for Texas to permit supplemental jury instructions; it was enough that "Texas law [allows] . . . the jury [to] be asked to consider whatever evidence of mitigating circumstances the defense can bring before it." Id. at 273.

The Court once again approved the Texas statute two years later in Lockett v. Ohio, 438 U.S. 586 (1978), while striking down an Ohio law that permitted only a limited range of mitigating circumstances to be considered in capital sentencing. The infirmities of the Ohio law were highlighted by comparing it to the Texas statute approved in Jurek. The Court noted that the Texas statute had survived constitutional attack "because

three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question -- despite its facial narrowness -- so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." 438 U.S. at 607 (citing Jurek, 428 U.S. at 272-73). Thus, the Texas statute could not be found to "prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," Lockett, 438 U.S. at 607.

Nowhere did Jurek or Lockett say that Texas was constitutionally required to give supplemental jury instructions where the wording of its special issues would result in a jury not being able fully to consider particular mitigating evidence. To the contrary, the Court appeared to

hold that a Texas jury could give constitutional consideration to a defendant's mitigating evidence within the framework of the statutory "special issues" because the Texas Court of Criminal Appeals had "broadly interpreted" these special issues. Texas courts and legal practitioners accordingly read Jurek and Lockett as sanctioning Texas' practice of denying any and all supplemental instructions that would permit its juries to give effect to mitigating evidence outside the channels of the three special issues.

For example, King v. State, 553 S.W.2d 105 (Tex. Cr. App. 1977), cert. denied, 434 U.S. 1088 (1978), squarely rejected the argument "that the jury will not have adequate guidelines to assist its [reasoned moral judgment] ... unless definitions for the terms contained [in

the special issues] are provided in the jury charge." Id. at 107. The King court reasoned that in Jurek this Court had "concluded that the submission of the [special] issues provided by [statute] . . . constitutionally guided the jury's determination of the punishment" and, therefore, "[n]o special definitions of the terms of that statute were required." Id.[31]

Similarly, in Ex parte Granviel, 561

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31 The inflexibility of Texas' practice is demonstrated by numerous cases, decided prior to Mr. Selvage's trial, in which the Texas Court of Criminal Appeals refused to provide any further definition for words and phrases within the special issues. See Gholson v. State, 542 S.W.2d 395, 397 (Tex. Cr. App. 1976) (1977) (challenge to future dangerousness question on grounds of its vagueness rejected); Collins v. State, 548 S.W.2d 368, 374 (Tex. Cr. App. 1976)(same); Granviel v. State, 552 S.W.2d 107, 117 (Tex. Cr. App. 1976)(meaning of the term "a probability" in the future dangerousness question deemed not vague or overbroad); Blansett v. State, 556 S.W.2d 322, 329 (Tex. Cr. App. 1977) (rejected claim that vagueness of future dangerousness question resulted in jury having unlimited discretion); Obryan v. State, 591 S.W.2d 464, 475 (Tex. Cr. App. 1979)(same).

S.W.2d 503 (Tex. Cr. App. 1978), the court rejected a claim that, in light of Texas' rigid practice of instructing juries in the exact wording of Article 37.071, the Texas statute "as applied is unconstitutional because it prevents the jury from considering a defendant's mental condition as a mitigating factor in relation to the two or possibly three statutory special issues to be submitted to the jury at the penalty stage of a capital murder trial." Id. at 516. The basis for this rejection was that since "the jury in answering the special issues may properly consider all the evidence adduced[,]" the statute "does not prevent the jury from considering a defendant's mental condition as a mitigating factor." Id.

In Adams v. State, 577 S.W.2d 717 (Tex. Cr. App. 1979), rev'd on other

grounds sub nom. Adams v. Texas, 448 U.S. 38 (1980), the Court of Criminal Appeals rejected an argument "that [mitigating] evidence is of no avail to the defendant if the jury is convinced by the evidence ... that the punishment issues should be answered affirmatively," because "the punishment of death is [then] mandatory even though the jury, on the basis of the mitigating evidence, may believe that death is inappropriate." 577 S.W.2d at 729. Citing Jurek and Lockett, the court concluded that it was sufficient that the Texas statute, in guiding the jury's discretion, made it possible for the defendant to present all mitigating evidence for the jury's consideration. Id. at 729-30.

Finally, in Quinones v. State, 592 S.W.2d 933 (Tex. Cr. App. 1980) -- less than one month before Selvage's trial--

the court rejected a claim that "an explanatory charge is necessary to keep the jury from disregarding the [mitigating] evidence properly before it." Id. at 947. Examining Jurek and Lockett, the court reasoned:

> Appellant correctly claims a right to consideration of mitigating circumstances by the jury deciding whether or not to impose the death penalty and he argues that the explanatory charge he requested is necessary to protect this right. We disagree with this conclusion. The Supreme Court has affirmed that . . . "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all [mitigating] evidence will be adduced." [Jurek v. Texas,] 428 U.S. at 276.... The question then is whether the language of the special issue is so complex that an explanatory charge is necessary to keep the jury from disregarding the evidence properly before it.... The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future

> criminal acts of violence. No additional charge is required.

592 S.W.2d at 947.

Therefore, at the time of Mr. Selvage's trial, the Texas courts' position was unequivocal and firmly settled: the "assurance upon which Jurek was based," Penry, 106 L.Ed.2d at 278, had already been fulfilled by the procedure of admitting a wide range of mitigating evidence as pertinent to special issue number two. Since the Texas statute was unique to that State, no cases from other jurisdictions offered Mr. Selvage's counsel any legal "tools" for presenting a Penry-type claim to the courts. Moreover, there was no support in federal caselaw for a reading of Jurek and Lockett that differed from the Texas courts' consistent reading of those decisions. The only federal case that ever discussed a challenge to Texas' practice at the time

Mr. Selvage was tried also relied squarely upon Jurek and Lockett in rejecting that challenge. See Granviel v. Estelle, No. CA-4-78-115 (N.D. Tx. Jan. 26, 1979). Hence, it was reasonably apparent that no further modification of the special-issue procedure, such as Texas' providing for supplemental jury instructions, was constitutionally demanded.

The situation confronting Mr. Selvage's counsel at the time of trial was thus one of total foreclosure, not mere "futility," as that term was used in Engle v. Isaac, 456 U.S. 107 (1982). In Engle, the Court rejected criminal defendants' arguments that they could not have realized at the time of their trials that the Due Process Clause was at odds with the Ohio statute requiring them to prove self-defense by a preponderance of the evidence and that, in any event, their

objecting to the statutory requirement at trial would have been futile because the Ohio rule had been in place for over a century.

The Court in Engle held that the legal foundation for the defendants' due process claim had been laid almost five years prior to the first of their trials in In re Winship, 397 U.S. 358 (1970), where the Court ruled that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364. The Court further noted that during those five years dozens of defendants in other states had used the Winship opinion to challenge successfully the constitutionality of rules requiring them to bear a burden of proof -- most often,

rules embodying well-established principles of law. In light of this history, the Court concluded that it could not be said that the Engle defendants had lacked the legal "tools" to fashion their claim. 456 U.S. at 132-33.

In dismissing the contention that any objection to the Ohio statute would have been fruitless, the Court held that "futility ... cannot alone constitute cause for a failure to object at trial." Id. at 130. Under the circumstances, where a time-honored Ohio practice had been called into serious question by a latter-day constitutional development and the Ohio courts had not yet been given the opportunity to reconsider settled state practice in the light of potentially supervening federal law, the Court observed that "[e]ven a state court that has previously rejected a constitutional

argument may decide, upon reflection, that the contention is valid," 456 U.S. at 130, and should be given a chance to do so.

In stark contrast, the legal landscape facing Mr. Selvage's counsel when he tried the issue of punishment in February of 1980 was totally uncompromising. The Court's Jurek and Lockett opinions had not called into question the Texas practice of instructing juries solely on the three special issues, and they could most readily be viewed as having sanctioned that practice. Jurek and Lockett had clearly foreclosed any challenge to the Texas statute's facial narrowness, and they had done so on the theory that the Texas courts' capacious reading of the special issues permitted capital defendants to present unlimited

mitigating evidence to the jury. Repeatedly asked to read Jurek's and Lockett's mandate of a "broad interpretation" of the special issues as requiring supplemental jury instructions when appropriate, the Texas courts had consistently read Jurek and Lockett to mean that Texas had sufficiently complied with constitutional requirements by admitting a broad range of evidence bearing on the question of future dangerousness, and that no further jury instructions allowing consideration of mitigating evidence outside the framework of the special issues was constitutionally required.

Since there was no reason for Mr. Selvage's counsel to believe that a challenge to the Texas courts' holdings

would find favor in the federal courts,[32] his failure to raise a pre-Penry claim in state court had nothing to do with erecting "a hedge against ... strategic risks," Reed, 468 U.S. at 14, in state courts "unsympathetic to the claim," Engle, 456 U.S. at 130. He had no "strategic motives of any sort" to manipulate the issue. Reed, 468 U.S. at 15. Simply put, Mr. Selvage's counsel reasonably believed that the issue was

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32 At the time of Mr. Selvage's trial, Granviel v. Estelle, supra, had rejected a challenge to Texas' practice. Moreover, this Court had denied certiorari on direct review of Texas decisions refusing to grant supplemental jury instructions, see King v. Texas, 434 U.S. 1088 (1978), and rejecting challenges to the vagueness of the future dangerousness question. See Gholson v. Texas, 432 U.S. 911 (1977); Granviel v. Texas, 431 U.S. 933 (1977); Collins v. Texas, 430 U.S. 959 (1977). Although denials of certiorari do not necessarily mean that the Court is in agreement with the decisions below, reasonable counsel would have concluded that federal review of the issues on which certiorari was denied was hardly likely, because the Court had re-affirmed Jurek in its Lockett opinion within a year after the denials of certiorari in King, Gholson, Granviel and Collins.

"dead." He saw no justification to raise a wholly frivolous claim.[33] This Court has noted that, under similar circumstances, "we [would] actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." Reed, 468 U.S. at 16 (footnote omitted).

To require that Mr. Selvage's counsel raise a Penry-type claim at the time of trial would have meant that counsel was expected to make a legally frivolous contention. This Court has never encouraged -- let alone demanded-- anything of the sort. Cf. Jones v.

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33 In its pleadings submitted to the United States Court of Appeals for the Fifth Circuit in Penry, Texas had argued that the Penry issue was "frivolous," Brief for Attorney General at 19, as well as "baseless," id., and "without merit." Id. at 21, 22.

Barnes, 463 U.S. 745 (1983). As it recognized in the context of Reed:

> 'Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may legitimately be regarded as debatable.'

468 U.S. at 16 (quoting Judge Haynsworth below).

Since Jurek and Lockett had apparently sanctioned Texas' special issue procedure, and the Texas courts had repeatedly interpreted those cases as foreclosing any type of Penry claim at the time Mr. Selvage was tried, Engle's command that a state court should be given the chance to rethink its position in light of federal law had been fully honored here. The Texas Court of Criminal Appeals was in fact given many

opportunities to re-examine its interpretation of Jurek and Lockett. It refused them time after time. King, 533 S.W.2d at 107; Adams, 577 S.W.2d at 729-30; Quinones, 592 S.W.2d at 947. At some point, surely, the Texas Court of Criminal Appeals was entitled to be taken at its word and no longer dunned by demands to change its recent decisions.[34]

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[34] See, e.g., Roberts v. LaVallee, 389 U.S. 40, 42-43 (1967), holding in an analogous setting that state courts need not be repeatedly asked to reconsider claims they have rejected. See also Nix v. Whiteside, 475 U.S. 157, 163 n.3 (1986)(Sixth Amendment claim not pressed before Iowa Supreme Court deemed exhausted since further proceedings would be futile); Duckworth v. Serrano, 454 U.S. 1, 3 (1981)(exception to exhaustion requirement recognized when "corrective process is so clearly deficient as to render futile any effort to obtain relief"); Blackledge v. Perry, 417 U.S. 21, 23-24 (1974)(futility found because North Carolina Supreme Court "had consistently rejected" similar claims); Brown v. Allen, 344 U.S. 443, 449 n.3 (1952)(in the exhaustion of state remedies, "we do not believe that Congress intended to require repetitious applications to state courts"); Wade v. Mayo, 334 U.S. 672, 682 (1948)(once one of two possible remedies has been exhausted to no avail, it is unnecessary, because likely futile, to invoke second remedy).

Ultimately, to be sure, this Court discovered the latent constitutional defect rooted in the application of the Texas statute, ruling in Penry that criminal defendants are entitled to supplemental jury instructions when necessary to prevent the jury from taking too narrow a view of mitigating circumstances. The Penry decision emanated from the Court's understanding of the promise of Jurek, "namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all the relevant mitigating evidence a defendant might present in imposing sentence." 106 L.Ed.2d at 276. Therefore, Penry was not deemed to be "new law" for purposes of Teague v. Lane, 103 L.Ed.2d 334 (1989); rather, the Court viewed it as the kind of evolutional elaboration of Jurek, in the light of

Lockett, that should enure to the benefit of all capital defendants whose cases became final after Lockett, in order to respect "'the constitutional standards that prevailed at the time the original proceedings took place,'" Teague, 103 L.Ed.2d at 353 (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969)(Harlan, J., dissenting)).

Penry read Jurek and Lockett as embodying the "assurance" that Texas capital defendants would have the opportunity for full consideration of their mitigating evidence even if Texas' special-issues procedure had to be altered to achieve this result. 106 L.Ed.2d at 276. But between the time of Jurek and the time of Penry, the Texas courts and legal practitioners had reasonably taken just the opposite view. In recognizing this fact, there is no inconsistency

between seeing that in retrospect Jurek foretold Penry and seeing that in prospect Jurek, as interpreted by the Texas court, foreclosed Penry-type claims. In exactly the same manner, Hitchcock v. Dugger, 481 U.S. 393 (1987), appeared to the Court to be a simple and uncontroversial application of Lockett; but from the standpoint of Florida judges and criminal practitioners, Hitchcock so thoroughly changed settled rules of state practice that the Florida Supreme Court appropriately recognized that Hitchcock claims could not properly be held to be procedurally barred for counsel's failure to raise them in anticipation of the Hitchcock decision. See Thompson v. Dugger, 515 So.2d 173, 175 (Fla. 1987)("[w]e find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its

Hitchcock opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson, to defeat the claim of a procedural default"). Accord, Hargrave v. Dugger, 832 F.2d 1528, 1533 (11th Cir. 1987).

An instructive parallel is the Court's recognition in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958), that "a local procedural rule, although it may . . . appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot [constitute an independent and adequate state ground barring Supreme Court review] . . ., because [litigants] . . . could not fairly be deemed to have been apprised of its existence." Similarly, the emergence of constitutional claims that seem consistent with precedent in hindsight--

as part of the evolutionary process described by Justice Harlan in Desist v. United States, 394 U.S. at 264, by which the meanings of "fundamental principles . . . are altered slowly and subtly as generation succeeds generation" -- may nonetheless be so inconceivable to legal practitioners immersed in a system as to be beyond the range of the claims that they are reasonably expected to urge upon a court.

Because a Penry-type contention was such a claim at the time of Mr. Selvage's trial, his counsel's failure to raise the issue should be excused for cause.

III. THE APPLICATION OF A PROCEDURAL BAR TO MR. SELVAGE'S PENRY CLAIM WOULD RESULT IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE

A. The Concept Of "Fundamental Miscarriage Of Justice" Cannot Be Limited To Constitutional Violations Which Have "Probably Resulted In The Conviction Of One Who Is Actually Innocent"

The Court has recognized that "'[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" Murray v. Carrier, 477 U.S. 478, 495 (1986) (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)). Even though in most cases, "'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard,'" id. at 495-96, the Court "do[es] not pretend that this will always be true." Id. at 496. In "an extraordinary case," therefore,

where "application of the cause and prejudice test will . . . result in a 'fundamental miscarriage of justice,'" Smith v. Murray, 477 U.S. 527, 537-38 (1986) (quoting Engle v. Isaac, supra)), the merits of an otherwise procedurally-barred constitutional claim must be decided. If the Court concludes that the state-court default ruling in Mr. Selvage's case survives Penry as a matter of state law, that its application in the post-Penry context constitutes an adequate and independent state procedural ground, and that Selvage has not shown cause for his default, the Court must decide whether his is the "extraordinary case" in which the miscarriage of justice exception should apply.

The primary definition which the Court has given thus far to the fundamental miscarriage of justice

exception is that it applies in cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," Murray v. Carrier, 477 U.S. at 496, or to the counterpart of this category of cases in the capital sentencing context. Smith v. Murray, 477 U.S. at 537-38.[35] While Carrier might be read to hold that the miscarriage of justice exception is limited to claims involving actually innocent prisoners, or to prisoners actually undeserving of the death sentence, a careful reading of Carrier demonstrates that it does not limit the exception to such claims. Moreover, the

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35 The ultimate factual question in a capital sentencing proceeding which parallels the question of actual innocence is whether the defendant is "actually [or factually] undeserving of the death sentence." See Ledewitz, Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence, 24 Crim. L. Bull. 379, 400 (1989).

exception should not be so limited, for a concern with the accuracy of the conviction or sentence is only one of the concerns that has informed the Court's judgment in other areas in which it has had to balance the right of a habeas petitioner to relief against the procedural obstacles to obtaining that relief.

Carrier's particular formulation of the miscarriage of justice exception arose in response to Justice Stevens' concurring opinion. See Murray v. Carrier, 477 U.S. at 492-97. The majority in Carrier interpreted his concurrence as calling for the application of the miscarriage of justice exception to any constitutional claim "that call[s] into question the reliability of an adjudication of legal guilt." 477 U.S. at 495. Noting that "the defaulted claims in

Engle, no less than respondent's claim in this case, did involve issues bearing on the reliability of the verdict," id.,[36] the Court refused to extend the miscarriage of justice exception to such claims solely because they called into question the accuracy of the determination of guilt. Id.

The Court did not exclude altogether, however, the possibility that claims involving the unreliability of the verdict could call for application of the miscarriage of justice exception. In a case of extreme unreliability -- "where a constitutional violation has probably

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[36] In Engle, the habeas petitioner's claim was that the Ohio instruction requiring the defendant to prove self-defense impermissibly shifted the state's burden of proof to the defendant because in Ohio self-defense negates the "purposeful conduct" element of the crime. In Carrier, the claim was that the trial court deprived the defendant of due process by precluding him from examining the rape victim's statements to the police for possible exculpatory evidence.

resulted in the conviction of one who is actually innocent" -- the Court held that the miscarriage of justice exception would be available.

Thus, in Carrier the Court did no more than formulate the miscarriage of justice test for constitutional claims whose only connection to fundamental unfairness is the very substantial risk that they have caused an unreliable result at trial. The concept of fundamental miscarriage of justice, or fundamental unfairness, however, has never been limited to errors which have actually infected the reliability of the trial.

In formulating the doctrine of harmless error, for example, the Court has recognized that "some constitutional errors require reversal without regard to the evidence in the particular case," Rose v. Clark, 478 U.S. 570, 577 (1986),

because "some errors necessarily render a trial fundamentally unfair." Id. The errors which fall into this category are errors which deprive the defendant of the right to a "basic trial process," id. at 578 n.6, a proceeding

> at which the defendant, represented by counsel, may present evidence and argument before an impartial jury and judge.

Id. at 578.

Further, in the companion procedural default case to Murray v. Carrier -- Smith v. Murray -- the Court's discussion of the "fundamental miscarriage of justice" exception to the procedural default rule was not focused at all on the defendant's "actual innocence" of the death sentence. Instead, it was focused on aspects of what the Court in Rose v. Clark called "the basic trial process." Thus, the Court concluded that Smith's claim of

constitutional error[37] did not involve a fundamental miscarriage of justice because the claimed error "neither precluded the development of true facts nor resulted in the admission of false ones," 477 U.S. at 538, and "did not serve to pervert the jury's deliberations concerning the ultimate question whether in fact petitioner constituted a continuing threat to society." Id. (emphasis in original). The test for fundamental miscarriage of justice thus was not limited to the Carrier question -- whether Smith was actually undeserving of the death sentence -- but included whether the constitutional error deprived him of such basic trial processes that it necessarily

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37 Smith claimed that the admission of psychiatric testimony at the sentencing phase of his capital trial to support a finding of future dangerousness violated his Fifth and Sixth Amendment rights in a manner later condemned in Estelle v. Smith, 451 U.S. 454 (1981).

rendered his trial unfair or its result unreliable.[38]

Similarly, in determining whether a state's interest in the finality of a criminal judgment should preclude the retroactive application of a "new rule" of constitutional law, the Court has focused on the rule, not on the specific, actual effects of its non-application in the petitioner's case. Teague v. Lane, 103 L.Ed.2d at 357-59 (plurality opinion). Thus, in Teague the plurality held that a new constitutional rule would be applied

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[38] Notably, Judge Henry Friendly, upon whom the Court relied in formulating the "actual innocence" component of the miscarriage of justice exception, see Smith v. Murray, 477 U.S. at 539 (citing Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi. L. Rev. 142 (1970)), himself disavowed the need for a showing of actual innocence when the constitutional error involves a component of the "basic trial process." See Friendly, op. cit., supra, at 151-53 ("one can hardly quarrel with the proposition that if a state does not afford a proper way of raising a constitutional defense at trial, it must afford one thereafter, and this without a colorable showing of innocence by the defendant").

retroactively if the failure to honor the newly-recognized right at trial "undermine[d] the fundamental fairness that must underlie a conviction or seriously diminish[ed] the likelihood of obtaining an accurate conviction." 103 L.Ed.2d at 359. As in Smith v. Murray, the concern for fairness underlying retroactivity determinations was a concern for whether the defendant was afforded a "basic trial process," Rose v. Clark, supra, not solely a concern about the defendant's actual innocence.

Accordingly, the "fundamental miscarriage of justice" exception to the procedural default rule must encompass constitutional errors which have deprived the defendant of a "basic trial process," in addition to those which, in a particular case, have "probably resulted in the conviction of one who is actually

innocent."

B. The Penry Error In Mr. Selvage's Trial Involves A Fundamental Miscarriage Of Justice

No matter what perspective the Court utilizes to measure the Penry error in Mr. Selvage's trial, the Court will find that the error presents a fundamental miscarriage of justice. It involves a deprivation of the most important constitutional right available to a defendant in a capital sentencing trial: the right to put on a defense -- to be heard as to why the death sentence should not be imposed. It involves, in particular, a rigid sentencing framework which prevented Mr. Selvage's jury from considering the two most powerful reasons for a capital sentencer not to impose the death sentence: severe physical, mental, and emotional disabilities which substantially decrease the defendant's

blameworthiness for the crime, and the fact that the defendant did not personally kill or procure the death of the victim of the capital murder. Finally it involves a defendant who, on the basis of all the relevant evidence, does not deserve a death sentence. In the remainder of this argument, Mr. Selvage will address each of these perspectives in more detail after first discussing the substance of the Penry violation in his trial.

i. The Penry Violation in Mr. Selvage's Trial

In Penry, the Court agreed with the petitioner's argument

> that his mitigating evidence of mental retardation and childhood abuse ha[d] relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment.

106 L.Ed.2d at 280. Mr. Selvage's

mitigating evidence was different from the evidence in Penry. Selvage relied on evidence of his drug addiction and the absence of any evidence that he fired the shot that killed Deputy Garza. Despite these differences, the special issues operated in Mr. Selvage's case just like they did in Penry. Their limited scope foreclosed any meaningful consideration by the jury of the mitigating weight of this evidence, because the evidence "ha[d] relevance to [Selvage's] moral culpability beyond the scope of the special issues." Penry, supra.

The evidence of Mr. Selvage's drug addiction was proffered by the defense as relevant to special issue two. However, like the petitioner's mental retardation in Penry, this evidence was "a two-edged sword: it ... diminish[ed] his blameworthiness for his crime even as it

indicate[d] that there is a probability that he will be dangerous in the future." Penry v. Lynaugh, 106 L.Ed.2d at 281. To the extent that drug addiction took away John Selvage's "free will," R. 2957, a reasonable juror certainly could have found that it reduced his moral culpability. See Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986) (opinion concurring in judgment) ("[s]ociety's legitimate desire for retribution is less strong with respect to ... defendants who have reduced capacity for considered choice"). However, since he never committed a crime before becoming an addict, a reasonable juror could also have found that the drug addiction -- proffered as the reason he committed all of his crimes -- plainly made it more likely that he would continue to commit crimes. Thus, even though the evidence of

drug addiction diminished Selvage's moral culpability, it -- like Johnny Penry's mental retardation -- also "suggest[ed] a 'yes' answer to the question of future dangerousness." Penry v. Lynaugh, 106 L.Ed.2d at 281. Because of this, "[t]he second special issue ... did not provide a vehicle for the jury to give mitigating effect to [Selvage's evidence of drug addiction]." Id. at 282.[39]

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39 The evidence of drug addiction might also have called for a "no" answer to special issue one, because the effects of drug intoxication might have been found to reduce the deliberateness of Selvage's particular criminal behavior. However, the defense did not make this argument. In similar circumstances, the concurring Justices in Franklin v. Lynaugh, 101 L.Ed.2d 155, 173-74 (1988), found that the jury's ability to consider the mitigating evidence had to be analyzed in accord with how it was proffered by the defense. As proffered here, the evidence of drug addiction demonstrated only that Selvage was drawn into criminal behavior that was not a chosen kind of behavior; it did not demonstrate that his ability to engage in "deliberate" conduct in the course of a particular crime was diminished. As in Franklin, "[t]his is not surprising," 101 L.Ed.2d at 174 (concurring opinion), because the evidence of Selvage's addiction did not encompass the effects of the particular drugs he took on the deliberateness of

Mr. Selvage's status as the person who fired the fatal shot was plainly relevant to special issue one. However, upon hearing the instruction concerning special issue one and the argument by defense counsel and the prosecutor about the scope of this issue, see pages 12-15, supra, the jury could reasonably have believed that even if Mr. Selvage did not actually kill Deputy Garza, this factor could not influence their consideration of special issue one.

The jurors were instructed without any elaboration by the court to decide "whether the conduct of ... John Henry Selvage, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the

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his conduct. Rather, it focused entirely upon his compulsive, unrelenting need to satisfy his addiction. Thus, it had no relevance to "deliberateness" and was relevant to "future dangerousness" only as an aggravating factor.

death of the deceased or another would result." JA 4. The arguments of defense counsel and the prosecutor, however, taught the jury that the phrase "conduct ... that caused the death of the deceased" had a broader meaning than the conduct that actually killed Deputy Garza. Counsel for both sides explained that the law allowed the jury to answer this question "yes" even if they believed that Mr. Selvage was not the actual killer. R. 2951 (defense counsel); 2968-71, 2972, 2973 (prosecutor). In light of this explanation, a reasonable juror could have understood the reference to Mr. Selvage's "conduct ... that caused the death of the deceased" as referring not only to any evidence that he actually killed Deputy Garza but also, more generally, to the evidence of his participation in the crime

during which Deputy Garza was killed.[40] With such an understanding of this phrase, a reasonable juror could then have believed that special issue one focused on whether Mr. Selvage's conduct that was established beyond a reasonable doubt--

[40] Not only would this understanding have been reasonable in the context of Mr. Selvage's trial, it would also have been consistent with the Texas Court of Criminal Appeals' construction of special issue one in Selvage's case. On appeal, Selvage argued that there was no evidence that he actually killed Deputy Garza and thus the "yes" answer to special issue one could not stand. Selvage v. State, 680 S.W.2d at 21-22. The Court rejected this argument:

> [A]though there is no direct evidence that appellant shot the deceased, the evidence was sufficient to show that his conduct was committed deliberately and with reasonable expectation that death would result. Unlike Enmund [in Enmund v. Florida, 458 U.S. 782 (1982)], appellant used lethal force to effectuate a safe escape and attempted to kill Ventura and Roberts as they pursued him and his companion from the jewelry store. Appellant's actions indicate a reasonable expectation that the death of the deceased or another would result.

Id. at 22. Plainly the Court of Criminal Appeals also construed "conduct ... that caused the death of the deceased" more broadly than "actual homicidal conduct."

his engaging in an armed robbery which he helped plan and his firing a gun at people other than Officer Garza during the course of the robbery -- was "committed deliberately and with the reasonable expectation that the death of the deceased ... would result." Jurors who understood the instruction in this fashion would have excluded their finding that Mr. Selvage was not the actual killer from their deliberations concerning special issue one.[41]

For these reasons, Mr. Selvage's status as the actual killer of Deputy Garza, like Johnny Penry's mental retardation in Penry v. Lynaugh, "was relevant to the question [asked in special

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[41] Such jurors would thus have disregarded defense counsel's plea, based on this factor, to answer special issue one "no." They would have perceived counsel's plea to their "conscience" as a plea to disregard the task required of them in answering special issue one.

issue one], but it also 'had relevance to [his] moral culpability beyond the scope of the special verdict questio[n].'" 106 L.Ed.2d at 280 (quoting Franklin v. Lynaugh, 101 L.Ed.2d 155, 173 (1988) (concurring opinion)). It was relevant to issue one if Selvage was the actual killer, for such status would tend to show that he caused the death of the deceased deliberately and with the reasonable expectation that death would result. If, however, the evidence tended to show that Selvage was not the actual killer (or failed to establish that he was), it would no longer be relevant to special issue one. Such a showing would nevertheless be highly relevant to Selvage's moral culpability, for the fact that someone participates in a felony murder as an accomplice or joint perpetrator but does not personally commit the murder is

manifestly a mitigating factor. See State v. Sonnier, 402 So.2d 650, 656 (La. 1981); Harmon v. State, 527 So.2d 182, 189 (Fla. 1989); Downs v. Dugger, 514 So.2d 1069, 1072 (Fla. 1987). See also Lockett v. Ohio, 438 U.S. at 608 (sentencer must be allowed to give independent mitigating weight to "defendant's comparatively minor role in the offense").

The jury instructions, as reasonable jurors could have understood them, thus did not allow the jury to consider doubt about Mr. Selvage's status as the triggerman as a mitigating factor. There were no supplemental or explanatory instructions given which would have assured the jury's consideration of this factor as a mitigating circumstance.[42] As

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42 Counsel for Mr. Selvage did request an instruction which would have allowed for this, see JA 4, but his request was denied. R. 2938.

the Court explained when faced with the same situation in Penry,

> In the absence of jury instructions defining [special issue one] in a way that would clearly direct the jury to consider fully [Selvage's] mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of [doubt about Selvage's status as the triggerman] in answering the first special issue.

106 L.Ed.2d at 281.

ii. The Penry Error Deprived Mr. Selvage of the "Basic Trial Process" Guaranteed to A Capital Defendant

The most fundamental and settled component of due process is the right to be heard in one's defense. "The theme that 'due process of law signifies a right to be heard in one's defence,' ... has continually recurred" for more than a century in the Court's jurisprudence. Boddie v. Connecticut, 401 U.S. 371, 377 & n.3 (1971) (citing cases) (quoting Hovey

v. Elliott, 167 U.S. 409, 417 (1897)). Denial of the right to be heard is such a fundamental error that it has been considered a denial of the "basic trial process" since at least the time of Hovey, where the Court held that "[a] sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." 167 U.S. at 414. The Penry error in Mr. Selvage's case deprived him of this most fundamental right.

The right to be heard in one's defense in a capital sentencing proceeding is the right to be heard as to why the death sentence should not be imposed. The exercise of this right is necessary to "ensure the reliability, under Eighth Amendment standards, of the determination

that 'death is the appropriate punishment in a specific case.'" Lockett v. Ohio, 438 U.S. at 601 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)). A procedure which cuts off the right to be heard, "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S. at 605. The right of the capital defendant to be heard is also necessary for "a system of capital punishment ... [to be] humane and sensible to the uniqueness of the individual." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). The "fundamental respect for humanity underlying the Eighth Amendment," Woodson v. North Carolina, 428 U.S. at 304, cannot countenance a process of capital sentencing which "treats all persons convicted of a designated offense not as uniquely individual human beings,

but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Id. Accordingly, the denial of the defendant's right to be heard as to why the death sentence should not be imposed both "undermine[s] the fundamental fairness that must underlie a [death sentence] [and] seriously diminish[es] the likelihood of obtaining an accurate [determination that death is the proper sentence in a particular case]." Teague v. Lane 103 L.Ed.2d at 359.

The Penry error in Mr. Selvage's case deprived him of the right to be heard because it prevented the jury from giving effect to the reasons he proffered in support of a life sentence. A capital defendant's right to be heard is not honored simply by allowing him to present mitigating evidence and argument, for

"Lockett requires the sentencer to listen." Eddings v. Oklahoma, 455 U.S. at 115 n.10. As the Court explained in Penry, "Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to give effect to that evidence in imposing sentence." 106 L.Ed.2d at 278. The sentencing procedure in Mr. Selvage's case prevented the jury from considering, i.e., giving effect to, his mitigating evidence as surely as if the jury had been explicitly directed not to consider that evidence.[43]

Accordingly, the Penry violation in Mr. Selvage's case had the effect of "abort[ing] the basic trial process."

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[43] See Rose v. Clark, 478 U.S. at 580 n.8 (condemning as fundamentally unfair, and never harmless, "'instructional errors that prevent a jury from considering an issue'") (quoting Connecticut v. Johnson, 460 U.S. 73, 95 n.3 (1983) (Powell, J., dissenting)).

Rose v. Clark, 478 U.S. at 578 n.6. It prevented the sentencer from engaging in the decisional process which is fundamental to the judgment required of capital sentencers by the Constitution.[44]

iii. The Penry Error in Mr. Selvage Case Precluded the Jury's Consideration of the Most Compelling Mitigating Circumstances That Can Be Proffered

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[44] In light of this analysis, the Court can readily distinguish the constitutional error presented in Dugger v. Adams, 103 L.Ed.2d 435 (1989), from the error presented here. The error presented in Adams was the error considered in Caldwell v. Mississippi, 472 U.S. 320 (1985): instructions by the trial judge and argument by the prosecutor diminished the jury's sense of responsibility for its sentencing decision. While this error plainly raised a question about the accuracy of the jury's sentencing recommendation, 103 L.Ed.2d at 446 n.6, it did not present an error which interfered with the "basic trial process" described in Rose v. Clark: it did not compromise the impartiality of the jury or judge, it did not deprive Adams of counsel, it did not interfere with Adams' presentation of evidence and argument, and it did not — as the error did here — prevent the jury from considering issues which it constitutionally had to consider in order to recommend a sentence. Accordingly, the Court's adoption of the definition of "fundamental miscarriage of justice" urged by Mr. Selvage would in no way be inconsistent with its holding in Adams.

The Penry error in Mr. Selvage's case did not just deprive him of the sentencer's consideration of "ordinary" aspects of his character, background, or crime. "Ordinary" mitigating circumstances -- "a turbulent family history," Eddings v. Oklahoma, 455 U.S. at 115; growing up in a poor family, Hitchcock v. Dugger, 481 U.S. at 397; receiving "[in]sufficient guidance and discipline" as a child, South Carolina v. Gathers, 104 L.Ed. 2d 876, 887 (1989) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting); being a "well-behaved and well-adjusted prisoner," Skipper v. South Carolina, 476 U.S. 1, 4 (1986); or being "an affectionate and caring person," South Carolina v. Gathers, supra; Hitchcock v. Dugger, supra -- are plainly "'mitigating' in the sense that they might

serve 'as a basis for a sentence less than death.'" Skipper v. South Carolina, 476 U.S. at 4-5 (quoting Lockett v. Ohio, 438 U.S. at 604). The mitigating circumstances in Mr. Selvage's case, however, were qualitatively different from these.

The Court has recognized that severe mental illness can be so disabling that "the Eighth Amendment prohibits a State from carrying out a sentence of death...." Ford v. Wainwright, 477 U.S. 399, 409-410 (1986) (plurality opinion). Mental illness short of that which would preclude the execution of a death sentence thus weighs heavily in favor of a life sentence. Such evidence "tend[s] to diminish the defendant's responsibility for his acts," making him "'deserving [of] less punishment....'" Skipper v. South Carolina, 476 U.S. at 12 (Powell, J.,

joined by Burger, C.J., and Rehnquist, J., concurring). Accord California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

Similarly, the Court has recognized that a defendant like Mr. Selvage, who neither kills nor encourages another to kill, is less morally culpable than an actual killer. As the concurring justices explained in Skipper v. South Carolina,

> Such evidence obviously [bears] strongly on the degree to which the defendant [is] morally responsible for h[is] crime; indeed, we have held that similar evidence precludes application of the death penalty for precisely this reason. Enmund v. Florida, 458 U.S. 782, 798-801 (1982).

476 U.S. at 12. While Tison v. Arizona, 481 U.S. 137 (1987), has made clear that the death penalty is an available punishment for a person like Mr. Selvage, Tison does not diminish the importance of

one's not being the killer in assessing moral culpability.

Because the two mitigating circumstances which were removed from the jury's consideration in Mr. Selvage's case were the kind of circumstances which, under slightly different conditions, would have precluded the imposition of a death sentence altogether, they would have weighed very heavily in favor of a life sentence. The harm to Mr. Selvage from the jury's inability to consider and give effect to these circumstances is, therefore, qualitatively and quantitatively greater than in a case involving any other kind of mitigating circumstance.

iv. The Penry Violation in Mr. Selvage's Case Probably Resulted in the Imposition of the Death Sentence on One Who Is Actually Undeserving of It

Although a condemned person should

not be required to show that he is "actually undeserving of the death sentence" in order to demonstrate that a Penry error has led to a fundamental miscarriage of justice in his case, Mr. Selvage can make such a showing if all the evidence bearing on this question is taken into account.

When the purpose of the miscarriage of justice inquiry is to determine whether the condemned prisoner actually deserves the death sentence, the inquiry must look to the factual bedrock of the sentencing question. All probative evidence, whether or not it was admitted at trial, must be taken into account. A plurality of the Court in Kuhlmann v. Wilson, 477 U.S. 436 (1986), recognized the need to do this in discussing the parallel question under 28 U.S.C. § 2244(b), whether the "ends of justice" require reconsideration in a

successive petition of a claim previously decided. The Court explained that the question of whether the prisoner has made "a colorable showing of factual innocence," 477 U.S. at 454, "must be determined by reference to all probative evidence of guilt or innocence." Id. at 454 n.17 (emphasis in original). Such an inquiry faithfully reflects the central historic purpose of the writ of habeas corpus: "the substance of 'justice,' not the form of procedures." Murray v. Carrier, 477 U.S. at 500 (Stevens, joined by Blackmun, JJ., concurring in judgment). To carry out this mission, "habeas corpus cuts through all forms and goes to the very tissue of the structure." Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

When all of the probative evidence in Mr. Selvage's case, is examined, see

pages 17-31, supra, it provides compelling support for the compassionate view of the crime and of Mr. Selvage which began to emerge at trial. The mitigating circumstances -- the doubt about whether Mr. Selvage shot Deputy Garza and the drug-based impairment of Mr. Selvage's ability to think and act appropriately which led him to commit the crimes he committed -- remain, but they are far more powerful than the evidence at trial suggested. Understood in light of all the probative evidence, the mitigating circumstances weigh very heavily in favor of a life sentence, for the real story of this case is a story of human frailty, not evil.

John Selvage was a young man whose life once held much promise. His family loved him, provided for his needs, and nurtured and stimulated him for the first

eighteen years of his life. The promise turned to despair, however, after Selvage spent two years in the military. He became addicted to drugs, which ate away his potential for a bright future and destroyed his youthful capacity for growth and creativity. He became further compromised by mental illness: the world which before had been encouraging and enlightening became threatening and bewildering. Driven toward people like Wilbur Kelly, who could help him feed his addiction through the fruits of crime, Selvage participated in two robberies, one at the Stop-and-Go market, and one four days later at Ventura's Jewelry. In each, Kelly was the aggressor, the triggerperson, the probable killer. Selvage was driven to these crimes by the gnawing agony of drug addiction and by the fear of what he perceived as an

increasingly threatening and hostile environment, not by greed or callousness or meanness of spirit.

In short, John Selvage probably killed no one, and his non-lethal participation in two felony-murders was a product of disability rather than purposeful conduct. There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to ... emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. at 545 (O'Connor, J., concurring). To sustain Mr. Selvage's death sentence in light of all the probative evidence would dishonor this foundational societal belief. It would treat "conduct that actually should militate in favor of a lesser penalty [than death], such as perhaps the

defendant's mental illness," Zant v. Stephens, 462 U.S. 862, 885 (1983), as an aggravating circumstance.

John Selvage is, accordingly, factually undeserving of death. Had the jury which sentenced him heard all the probative evidence and been allowed to give full effect to its consideration of the evidence, it probably would not have sentenced him to death. The refusal of the federal habeas courts to reach the merits of Mr. Selvage's Penry claim has, therefore, resulted in a fundamental miscarriage of justice.

CONCLUSION

For these reasons, petitioner respectfully requests that the Court vacate the judgment and opinion of the Court of Appeals and remand his case, with instructions that the District Court grant the writ of habeas corpus, or in the

alternative, hold an evidentiary hearing to determine whether on the basis of all the probative evidence, Mr. Selvage deserves the death sentence.

Respectfully submitted,

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APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES OF THE STATE OF TEXAS

Tex. Code Crim. Proc. Ann. art 37.071 (Vernon 1981):

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or

against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would con-stitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by

the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.